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IN THE COURT OF APPEALS OF INDIANA

STEVEN C. DODDS and KELLIE R. DODDS,	)	
	)	
Appellants-Plaintiffs,	)	
	)	
vs.	)	No. 43A05-0708-CV-478
	)	
STEPHEN M. HAY, NURA K. TURNER, and JOHN P. TURNER,	)	
	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE KOSCIUSKO SUPERIOR COURT
The Honorable Duane G. Huffer, Judge
Cause No. 43D01-0603-PL-151

May 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellants-plaintiffs Steven C. Dodds and Kellie R. Dodds appeal the judgment entered in favor of appellees-defendants Stephen M. Hay, Nura K. Turner, and John P. Turner (collectively, the appellees) following a bench trial on the Doddses' complaint against the appellees for declaratory judgment and to quiet title. Specifically, the Doddses raise the following arguments: (1) the trial court erroneously found that they were collaterally estopped from making certain arguments because of an order entered in a 1987 quiet title action; and (2) the trial court erroneously found that the Doddses have failed to establish title to a portion of their driveway encroaching on the appellees' property by adverse possession or a prescriptive easement. Finding no error, we affirm.

FACTS

On July 27, 1987, the Doddses acquired title to real estate fronting Syracuse Lake in Kosciusko County (the Dodds Property). In 1975, the Estate of Beulah M. Roose had conveyed title to the property to Max and Mary Ganshorn. A survey performed on the property revealed, however, that there was a discrepancy between the tract actually owned by Roose and the tract that was conveyed to the Ganshorns. Specifically, there was approximately a fourteen-foot gap between the south line of the tract conveyed to the Ganshorns and the north line of Lot Number 1, the plat that adjoins the property to the south. Because the same legal description contained in the Ganshorns' deed was utilized in the subsequent deeds in the Doddses' chain of title, the fourteen-foot gap carried through to their acquisition of the property.

In 1966, Martin and Edna Dider owned Lot Number 1 and constructed a seawall along the shoreline of what they believed to be Lot Number 1 but was actually located in

the fourteen-foot gap created by the Roose Deed. On October 19, 1987, the Diders filed a complaint to quiet title to the gap, which was believed at that time to comprise a total of 14.64 feet. The Diders named a number of defendants, including the Doddses. The Doddses filed an answer admitting all of the allegations in the complaint. On December 8, 1987, the trial court in the quiet title action entered an order quieting title in the Diders to the gap covered by their complaint.

The next day, the Diders conveyed title to Lot 1 to Stephen M. Hay. Hay eventually turned Lot Number 1 into a two-unit condominium development, with Hay owning Unit 1 and John and Nura Turner owning Unit 2. The Dodds Property contains a driveway that encroaches on Lot Number 1. Neither the Doddses nor the appellees knew that the driveway encroached on that land until a survey was performed in 2002.

On March 8, 2006, the Doddses filed a complaint against the appellees to quiet title in two parcels of land: (1) a portion of land located on the property that was quieted in the Diders' favor in 1987; and (2) the portion of Lot Number 1 onto which the Doddses' driveway encroaches. Hay and the Turners filed an answer and a counterclaim seeking a permanent injunction against the Doddses with respect to their use of the driveway.

On January 30 and April 16, 2007, the trial court held a bench trial on the pending claims. On June 7, 2007, the trial court entered an order that finds, in pertinent part, as follows:

> 10. . . . in exchange for consenting to the ownership of the quiet title tract containing 12.41 feet of the shoreline of Syracuse Lake [the Doddses] would receive title to the remaining 2.23 feet along the

shoreline of Syracuse Lake which, when such two tracts were taken together, constituted the 14.64 foot gap along the shoreline . . . .

11. From date of entry of the Order in the quiet title action, that is December 8, 1987 until March 2006, [the Doddses] took no action to secure title to that real estate which they now claim.

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16. There exists as part of the access to the [Doddses'] real estate described above, a gravel driveway which has served the [Doddses'] real estate since title was acquired by Max Ray Ganshorn on April 10, 1975. . . . [T]he driveway has been in the same location and utilized by [the Doddses] and [the Doddses'] predecessors in title since 1975. [The Doddses] exercised control over the driveway with the intent to utilize it for access to their property and the driveway was clearly visible to the Hay-Turner and the Hay-Turners' predecessors in title show a consistent location of the driveway beginning in 1974.

17. . . . [A January 24, 2002, survey] shows the driveway to encroach distances of 5.63 feet and 4.70 feet into the triangular tract depicted on that survey. . . .

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CONCLUSIONS OF LAW

1. The Kosciusko Superior Court order in the quiet title action was entered with the consent of [the Doddses].

2. The location of the northern boundary of the real property in dispute was fixed and determined in and by virtue of the order in the quiet title action.

3. The order in the quiet title action constitutes a final judgment on the merits.

4. Sufficient time has not passed since entry of order in the quiet title action to allow [the Doddses] possession of the driveway which encroaches on the Hay-Turner property either by adverse possession or acquiescence.

Appellant's App. p. 7-10. The trial court found in the defendants' favor on the Doddses' complaint and granted a permanent injunction ordering the Doddses to remove their driveway. The Doddses now appeal.

DISCUSSION AND DECISION

I. Collateral Estoppel

Essentially, the Doddses seek to relitigate the northern boundary of Lot Number 1 as settled by the Diders' quiet title action in 1987. They primarily base their claim on two arguments—the survey underlying the 1987 quiet title action allegedly contained certain errors and the legal description of the property contained in the order is allegedly faulty and describes a property that does not close.

Collateral estoppel, or issue preclusion, bars the subsequent relitigation of the same fact or issue where that fact or issue was necessarily adjudicated in a former suit and the same fact or issue is presented in a subsequent action. Eichenberger v. Eichenberger, 743 N.E.2d 370, 374 (Ind. Ct. App. 2001). Where issue preclusion applies, the previous judgment is conclusive only regarding those issues actually litigated and determined therein. Id. "Issue preclusion requires: (1) a final judgment on the merits in a court of competent jurisdiction, (2) identity of issues, and (3) the party to be estopped was a party or the privity of a party in the prior action." Sims v. Scopelitis, 797 N.E.2d 348, 351 (Ind. Ct. App. 2003).

The Doddses first argue that the description of the property in the 1987 order was legally erroneous, inasmuch as it describes a parcel of property that does not close. We find, however, that notwithstanding any errors in the description, "a sufficient part of the

description remains for purposes of identification." 23 Am. Jur. 2d Deeds § 54 (1983). Thus, the legal description contained in the 1987 order is sufficient to enforce that order.

Next, the Doddses contend that the 1985 survey on which the 1987 order was based was inaccurate. This argument is a straightforward collateral attack on that judgment. The Doddses admitted to every allegation of the Diders' quiet title complaint and raised no objection during those proceedings. They may not now take a second bite of the apple and relitigate those issues.

Finally, the Doddses insist that they reached a separate agreement with the Diders in 1987 providing that the Doddses would retain title to approximately two feet of the gap in exchange for their agreement to acquiesce to the Diders' complaint in all other respects. Inasmuch as this agreement would alter the terms of the 1987 order, it is merely yet another impermissible collateral attack on that judgment. In sum, we find that the Doddses are collaterally estopped from raising these challenges to the 1987 order, to which they assented in full.

The Doddses also argue that they did not have a full and fair opportunity to litigate the issues of the northern boundary of the property in question in the 1987 quiet title action. They attempt to bootstrap the aforementioned challenges regarding the allegedly erroneous 1985 survey and the alleged separate agreement reached with the Diders into this argument. We have already concluded, however, that these challenges are impermissible. In any event, we do not believe that these issues affected the Doddses' opportunity to fully and fairly litigate the issues in 1987. They also point out that in 1987, they were both members of the military and were stationed in other locations.

While that is true, they were represented by an attorney at the quiet title proceedings and were able to communicate with their attorney on a regular basis. Thus, we do not find that to be sufficient to establish that they were deprived of a full and fair opportunity to litigate the issues in 1987. Ultimately, we find that collateral estoppel applies herein and that its application would not be otherwise unfair to the Doddses.

II. Adverse Possession

The Doddses also contend that the trial court erroneously concluded that they have not established title to the driveway that encroaches onto Lot Number 1 by adverse possession or by a prescriptive easement. To establish a claim for title by adverse possession, the Doddses must establish the elements of control, intent, and notice for a continuous ten-year period. Fraley v. Minger, 829 N.E.2d 476, 486 (Ind. 2005). The claimant must also establish substantial compliance with the adverse possession tax statute. Id. at 493; Ind. Code § 32-21-7-1. The elements for prescriptive easements are essentially the same—the claimant must establish control, intent, and notice for a twenty-year period. Wilfong v. Cessna Corp., 838 N.E.2d 403, 405-06 (Ind. 2005). There is no tax requirement to establish title via a prescriptive easement. Chickamauga Prop., Inc. v. Barnard, 853 N.E.2d 148, 155 (Ind. Ct. App. 2006).

To establish notice, the adverse possessor's actions must have been sufficient to give actual or constructive notice to the legal owners. Piles v. Gosman, 851 N.E.2d 1009, 1016 (Ind. Ct. App. 2006). Mere possession of the land is not enough. Marengo Cave Co. v. Ross, 212 Ind. 624, 632, 10 N.E.2d 917, 920 (1937). Instead, the claimant's possession must be visible and open to the common observer so that the owner or his

agent, on visiting the premises, might readily see that the owner's rights are being invaded. Id.

Here, it is undisputed that neither the Doddses nor the appellees became aware of the fact that the driveway encroached onto Lot Number 1 before a survey was performed in 2002. Before that survey was performed, it was not readily apparent to any of these parties that Hay and Turner's rights were being invaded by the Doddses, and the Doddses have therefore failed to establish notice prior to that time. Thus, the statute of limitations did not begin to run until 2002, meaning that not even five years had passed before the Doddses filed their quiet title action. The trial court, therefore, properly concluded that the Doddses have not established title to the portion of their driveway that encroaches on Lot Number 1 by adverse possession or a prescriptive easement.[1]

The judgment of the trial court is affirmed.

RILEY, J., and ROBB, J., concur.

[1] The Doddses do not challenge the trial court's permanent injunction ordering them to remove the offending portion of their driveway from Lot Number 1.